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Supreme Court, U.S.
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In The
Supreme Court Of The United States
October Term, 1998

JOHN TYLER FUESSENICH,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI (WITH ATTACHED APPENDICES)

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment exclusionary rule applies to probation revocation proceedings?

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CITATIONS TO OPINION AND ORDER BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at 50 Conn. App. 187, 717 A.2d 801 (1998). (Pet. App. at 1A-13A). The Petitioner filed a Motion For Reconsideration Or Reargument En Banc with the Appellate Court which was denied on November 17, 1998. It is reprinted in Petitioner's Appendix at 14A-29A. The trial court's written decision is reprinted in the Petitioner's Appendix at 51A-66A. The Petitioner filed a Petition For Certification To Appeal to the Connecticut Supreme Court which was denied on January 12, 1999. (Pet. App. at 31A-48A).

BASIS FOR JURISDICTION

The opinion of the Appellate Court of the State of Connecticut was reported on September 1, 1998. See Pet. App. at 1A. The Petitioner's Petition For Certification To Appeal to the Connecticut Supreme Court was denied on January 12, 1999. See Pet. App. at 49A-50A.

The Petitioner is relying upon Rules 10 et seq. of the Rules of the Supreme Court of the United States in filing this petition. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 ("Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree").

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Connecticut, Article 1, Section 7

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and no warrant to search any place, or to seize any persons or things, shall issue without describing them as nearly as may be, not without probable cause supported by oath or affirmation.

STATUTORY PROVISION INVOLVED

Connecticut General Statutes Section 53a-155:
Tampering with or fabricating physical evidence: Class D felony

(a) A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding.

(b) Tampering with or fabricating physical evidence is a class D felony.

STATEMENT OF THE CASE

A. Introduction

This petition raises an important federal question as to whether the Fourth Amendment exclusionary rule applies in probation revocation proceedings.

B. Facts Material To The Consideration Of The Question Presented.

On July 11, 1995, the Petitioner, John Tyler Fuessenich, pleaded guilty to three counts of tampering with physical evidence in violation of Conn. Gen. Stat. § 53a-155. The Petitioner received a three year sentence, execution suspended and three years of probation. These pleas were entered after the Petitioner was tried twice for murder. The first trial resulted in a mistrial when the jury could not agree on a verdict. The second trial resulted in a not guilty verdict.

On September 26, 1995, Michael Kalet, the Petitioner's probation officer, applied for an arrest warrant alleging that the Petitioner had violated a condition of his probation. (Pet. App. at 87A-93A). The arrest warrant alleged that the Petitioner had failed a drug test performed by Mr. Kalet. On January 2, 1996, the Petitioner filed a motion to exclude as evidence, at the probation violation hearing, the results of the test of the urine purportedly obtained from the Petitioner. (Pet. App. at 67A-68A). The Petitioner maintained that his probation officer had

"impermissibly infringed upon the Defendant's constitutional right under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 8 and 20 of the Connecticut Constitution to be free from unreasonable searches and seizures by requiring the Defendant to submit to urinalysis." (Pet. App. at 84A).

On March 19, 1996, in a written decision, the trial court (Pickett, J.) granted the Petitioner's motion to exclude the results of the drug test. (Pet. App. at 51A-66A), The trial court (Pickett, J.) concluded that: (1) there was no evidence presented to the sentencing court (Pickett, J.) regarding alleged drug use by the Petitioner; (2) there was no evidence admitted at the first trial dealing with the Petitioner's alleged drug use; (3) drug testing was not "reasonably related" to the crime of tampering with the evidence; (4) the urinalysis imposed by the State did not fall within the definition of medical treatment; and, (5) that drug testing was not a condition which the sentencing court could have imposed on the Petitioner. (Pet. App. at 51A-66A). The trial court concluded that:

> the probation officer imposed a probation condition upon the defendant which was not "reasonably related" to the purposes of his probation. Thus the condition that defendant submit to urinalysis diminished his privacy expectations beyond the extent necessary for his reformation and rehabilitation. Accordingly the search and seizure of defendant's urine was an unreasonable search and

seizure in violation of Article I, §7 of the Connecticut Constitution.

(Pet. App. at 64A). The court concluded that the results of this illegal search and seizure must be suppressed. (Pet. App. at 65A-66A).

The trial court (Walsh, J.), on October 1, 1996, dismissed the State's Information charging the Petitioner with a violation of probation. The State then moved to have the conditions of the Petitioner's probation modified to include drug testing. The trial court (Walsh, J.) granted the State's Motion to Modify or Enlarge the Conditions of Probation.

The State of Connecticut appealed the trial court's decision to suppress the results of the drug test. The Appellate Court of Connecticut heard oral argument on the State's Appeal on April 27, 1998 and on July 21, 1998 the Petitioner filed a Motion to Dismiss this appeal because he had completed his probationary period. This motion was denied, and the Appellate Court issued its decision on September 1, 1998. State v. Fuessenich, 50 Conn. App. 187, 717 A.2d 801 (1998) (Pet. App. at 1A). The Court reversed the holding of the trial court and concluded that under the Fourth Amendment to the United States Constitution, the results of the urinalysis should not have been suppressed because the exclusionary rule did not apply to probation revocation hearings. Fuessenich, 50 Conn. App. at 196-99 (Pet. App. at 10A-13A).

The Petitioner filed a Motion For Reconsideration Or Reargument En Banc on September 10, 1998. (Pet. App. at 14A-29A). This was denied on November 17, 1998. (Pet. App. at 30A). The Petitioner filed a Petition For Certification To Appeal with the Connecticut Supreme Court. (Pet. App. at 31A-48A). This Petition was denied on January 12, 1999. (Pet. App. at 49A-50A).

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari should be granted because the Appellate Court for the State of Connecticut has decided an important federal question in a way that conflicts with decisions of three United States Courts of Appeals and other state courts. Additionally, because the Connecticut Appellate Court has decided an important question of federal law that has not been, but should be, decided by this Court, the Petition for Writ of Certiorari should be granted.

Three United States Courts of Appeals, when considering the protections provided by the Fourth Amendment to the United States Constitution, have concluded that the protections contained therein provide for the application of the exclusionary rule in probation revocation proceedings.

In determining whether the exclusionary rule should apply to illegally obtained evidence, courts engage in a balancing test in which the potential injury to the fact-finding process is balanced against the potential benefit of the rule as applied in this context. United States v. Calandra, 414 U.S. 338, 349 (1974).[1] When the injury to

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[1] In Calandra, this Court determined that the exclusionary rule would not apply in grand jury proceedings. In reaching its decision, the Court considered numerous factors including: (1) that the grand

the fact-finding process is measured against the benefit of the application of the exclusionary rule to probation revocation proceedings where the officer is aware of the probationer's status, it is apparent that the balance favors the application of the exclusionary rule.

In United States v. Rea, 678 F.2d 382 (2d Cir. 1982), the United States Court of Appeals for the Second Circuit examined these competing interests and determined that the balance favored the application of the exclusionary rule. The Court reasoned that requiring the probation officer to obtain a warrant before conducting a search would:

> not interfere significantly with either of the dual functions of probation [to rehabilitate the offender and protect the public]. Since a warrant can be obtained ex parte, and generally quickly, and since in exigent circumstances the normal exceptions to the warrant requirement would apply, the law enforcement function of probation officers is

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jury did not determine guilt or innocence; (2) that traditionally evidentiary rules do not apply in the grand jury context; (3) that allowing people to invoke the exclusionary rule before the grand jury would transform grand jury proceedings into "preliminary trials on the merits"; and (4) that any delay caused by such hearings may be fatal to the enforcement of the criminal law. Id. at 349-50. The Court went on to find that any deterrent effect would be incremental. Id. at 351.

> unlikely to be hampered. In this case, for example, there apparently was no reason why the probation officer could not have obtained a warrant prior to going to Rea's home . . . In addition, the rehabilitative goals of probation are not apt to be furthered by either the threat or the practice of unauthorized warrantless searches. On the other hand, a probation officer who seeks to discover and seize evidence for use in a probation revocation hearing is very likely to be deterred from proceeding without a warrant if the officer knows that evidence so seized is apt to be excluded from the very proceeding with which he is concerned.

Id. at 389-90. The Court went on to hold that "the exclusionary rule must be applied in probation revocation proceedings to bar the use of evidence illegally seized by probation officers." Id. at 390.

The Ninth Circuit Court of Appeals also concluded that the exclusionary rule applies to probation revocation proceedings if the searching officer is aware of the probationer's status. In United States v. Winsett, 518 F.2d 51 (9th Cir. 1975), the Court concluded that the exclusionary rule would not apply generally to probation revocation proceedings, and held that "the Fourth Amendment does not require suppression of evidence in a probation revocation proceeding where, at the time of arrest and search, the police had neither knowledge nor reason to believe that the suspect was a probationer." Id. at 55 (emphasis added).

The Ninth Circuit's holding that the exclusionary rule should not be used in probation revocation proceedings applies only in situations where the searching officer is unaware of the probationer's status. The Ninth Circuit has, in subsequent cases, noted the difference in applying the exclusionary rule in those cases where the offending officer is aware of the probationer's status. See United States v. Vandemark, 522 F.2d 1019, 1020 (9th Cir. 1975) ("We held that evidence obtained in violation of the Fourth Amendment is admissible in probation revocation proceedings if, at the time of the search, the law enforcement officers did not know or have reason to believe that the suspect was on probation").

The Fourth Circuit Court of Appeals, in United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978), went further and concluded that the exclusionary rule should apply in probation revocation proceedings regardless of the officer's knowledge of the status of the probationer. The Workman Court, after engaging in the Calandra balancing test, concluded that:

> [c]onsideration of the nature of a probation revocation hearing leads to the conclusion that the application of the exclusionary rule will result in approximately the same potential for injury and benefit as its application in other criminal adjudicative proceedings.

Id. at 1210. The Court went on to hold that "... evidence obtained by unconstitutional searches of a probationer's

property is inadmissable in a federal probation revocation hearing." Id. at 1211. The Court remanded the matter to the district court for a determination of whether the defendant's probation would have been revoked if the illegally seized evidence had not been considered by the court. Id.

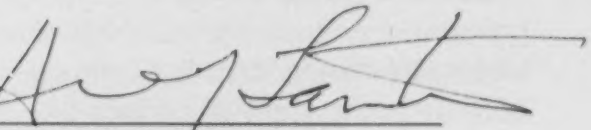
State courts have also determined that the exclusionary rule of the Fourth Amendment applies in probation revocation proceedings when the officer is aware of the probationer's status. See Adams v. State, 264 S.E.2d 352, 353 (Ga. Ct. App. 1980) (concluding that "illegally seized evidence may not be used to revoke probation" and basing conclusion on Aikens v. State, 240 S.E.2d 117 (Ga. Ct. App. 1977)); State v. Lomardo, 295 S.E.2d 399 (N.C. 1992) (after application of Calandra balancing test, Court concluded that exclusionary rule would not be applicable probation officer was aware of probationer's status).

The considerations recognized in the cases cited by the Petitioner are applicable to the instant proceedings. A probation revocation proceeding can involve a significant loss of liberty and probation officers may be encouraged to illegally seize evidence if they know it can be used against a probationer at his revocation hearing. To insure that the Petitioner's Fourth Amendment rights are protected, this Court should grant certiorari in this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Appellate Court for the State of Connecticut should be granted.

THE PETITIONER,

BY 

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STATE OF CONNECTICUT *v.* JOHN TYLER FUESSENICH (AC 16605)

Spear, Hennessy and Daly, Js.

Syllabus

The state, on the granting of permission, appealed to this court from the judgment of the trial court dismissing an information that charged the defendant with violation of his probation. The defendant's probation officer had required the defendant to submit to random drug testing as a condition of probation and when, a urinalysis revealed the presence of cocaine, the officer obtained an arrest warrant alleging that the defendant had violated the condition of his probation that he "not violate any criminal law." *Held*:

1. The statute (§ 54-96) permitting the state to take an appeal in a criminal case applies to decisions in probation revocation hearings; a probation revocation hearing is a continuing consequence of the original criminal conviction that sufficiently relates back to the original criminal proceeding to make it a criminal case within the meaning of § 54-96.

2. The trial court improperly determined that the probation officer exceeded his authority in imposing the drug testing requirement and that the results were therefore the product of an unreasonable search and seizure; in requiring the defendant to submit to testing, the probation officer acted within the authority conferred on him by the statute (§ 53a-30 [b]) that provides that a defendant may be required to submit to any condition that the sentencing court could have imposed that is not actually inconsistent with any condition actually imposed by that court.

3. The trial court improperly concluded that the exclusionary rule barred introduction of the results here; the exclusionary rule does not apply to probation revocation hearings.

Argued April 27—officially released September 1, 1998

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Litchfield, where the court, *Pickett, J.*, granted the defendant's motion to suppress certain evidence; thereafter, the court, *R. Walsh, J.*, granted the defendant's motion to dismiss the information, and the state, on the granting of permission, appealed to this court. *Reversed; further proceedings.*

Rita M. Shair, assistant state's attorney, with whom were *Frank Maco*, state's attorney, and, on the brief, *Guy Wolf*, senior assistant state's attorney, for the appellant (state).

Patrick S. Bristol, with whom were *Hubert J. Santos* and *Hope C. Seeley*, for the appellee (defendant).

Opinion

SPEAR, J. The state appeals from the trial court's dismissal of a violation of probation charge that was filed against the defendant.[1] The state claims as a threshold matter that a probation revocation hearing is a criminal case from which an appeal can be taken pursuant

[1] This appeal has been consolidated with both the state's civil appeal from the same judgment (AC 16487) and the defendant's appeal from the trial court's judgment modifying and enlarging the conditions of his probation to include a drug testing provision (AC 16486). Decisions on those appeals have been published separately.

to General Statutes § 54-96.[2] The state also claims that the trial court improperly (1) suppressed test results and (2) found that the defendant's probation officer exceeded his statutory authority by requiring the defendant to submit to urinalysis as a condition of probation. We agree and reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On July 11, 1995, the defendant pleaded guilty to three counts of tampering with evidence in violation of General Statutes § 53a-115.[3] He was sentenced to four years imprisonment with execution suspended and three years probation. The trial court issued a probation order that provided in relevant part: "It is ordered and adjudged that . . . [s]aid defendant during the probationary term fixed shall abide by the written statement of the conditions of probation furnished by the probation officer and the instructions given regarding the same." Thereafter, the defendant was assigned a probation officer. Upon meeting with the defendant the following day, the probation officer required the defendant to sign a form that advised the defendant of his rights and duties with respect to his probation, as well as the conditions of his probation. The written statement contained a drug testing condition that was included by the probation officer.[4] This

[2] General Statutes § 54-96 provides: "Appeals from the rulings and decisions of the Superior Court, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the Supreme Court or to the Appellate Court, in the same manner and to the same effect as if made by the accused." This court, in response to the defendant's motion to dismiss both of the state's appeals, ordered the parties to brief the issue of whether this is a criminal or civil case for appeal purposes.

[3] The defendant was originally charged with murder in violation of General Statutes § 53a-54a. The defendant's initial trial was declared a mistrial and he was acquitted of the murder charge after the second trial.

[4] The form set forth ten conditions of probation. The relevant conditions for purposes of this appeal are: "(1) Do not violate any criminal law of the United States, this state or any other state or territory . . . [and] (7) Submit to any medical and/or psychological examination, urinalysis, and/or counsel-

condition was not expressly included by the trial court as a condition of the defendant's probation. The next day, the clerk of the court issued a probation order requiring the defendant to "abide by the written statement of the conditions of probation furnished by the probation officer and the instructions given regarding the same."[5] The defendant's probation officer thereafter required the defendant to provide a specimen for urinalysis. This specimen tested positive for cocaine on August 14, 1995. The probation officer then obtained an arrest warrant for the defendant for the alleged violation of the conditions of his probation. Specifically, the probation officer alleged that the defendant tested positive for cocaine use in violation of his probation condition that he "not violate any criminal law." The defendant was then charged with violating the terms of his probation.

The defendant filed a motion to dismiss the violation of probation charge and to exclude evidence of the test results. In his motion, he asserted that the probation officer exceeded his statutory authority and violated both the defendant's state and federal constitutional rights by requiring him to submit to urinalysis. The defendant also claimed that because there was no evidence in the sentencing record relating to drug use or abuse by the defendant, the urinalysis condition is not otherwise reasonably related to the tampering with evidence conviction. He further argued that the requirement that he submit to random drug testing therefore violated his right to be free from unreasonable searches and seizures as provided in the fourth amendment to the United States constitution and article first, §§ 7, 8

ing sessions as required by the Court and submit to any alcohol and/or drug testing required by the Probation Officer." The form also stated that the defendant could be arrested and his probation revoked for not complying with the conditions of probation that were listed on the form.

[5] The defendant claims that he never received this order.

and 20, of the constitution of Connecticut. After the conclusion of the defendant's probation revocation hearing, the trial court, *Pickett, J.*, suppressed the urinalysis results, relying on Practice Book § 821, now § 41-12, and *State* v. *Marsala*, 216 Conn. 150, 156, 579 A.2d 58 (1990). The trial court concluded that "the evidence against the defendant was obtained in excess of statutory authority and in violation of his right to be free from unreasonable searches and seizure under article first, § 7, of the constitution of Connecticut." Thereafter, the state represented that it had no other evidence and the trial court, *Walsh, J.*, dismissed the violation of probation charge. The trial court granted the state's motion for permission to appeal the trial court's ruling. This appeal followed.

I

We first address the jurisdictional question of whether a probation revocation hearing is a criminal case that can be appealed to this court pursuant to General Statutes § 54-96.[6] The state claims that a probation revocation hearing is a continuing consequence of the original criminal conviction that sufficiently relates back to the original criminal proceeding so as to make this a criminal case.[7]

Our Supreme Court has stated that "[t]he element of 'punishment' in probation revocation of [a] defendant is attributable to the crime for which he was originally convicted and sentenced. Thus, any sentence [the] defendant had to serve as the result of the violation of the special condition was 'punishment' for the crime of which he had originally been convicted. Revocation is a continuing consequence of the original conviction

[6] See footnote 2.

[7] The defendant argues that the present case is neither a criminal nor a civil case for appeal purposes, and, thus, no appeal may be taken pursuant to General Statutes § 54-96.

from which probation was granted." *State* v. *Smith*, 207 Conn. 152, 178, 540 A.2d 679 (1988). "Because [r]evocation is a continuing consequence of the original conviction from which probation was granted . . . and the inherent authority to convict and sentence a defendant flows from the authority to adjudicate a criminal cause of action, the subject matter jurisdiction over a probation revocation proceeding derives from the original presentment of the information." (Citation omitted; internal quotation marks omitted.) *State* v. *Carey*, 222 Conn. 299, 306, 610 A.2d 1147 (1992); see also *Liistro* v. *Robinson*, 170 Conn. 116, 128, 365 A.2d 109 (1976).

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *State* v. *Carey*, supra, 222 Conn. 304; 1 Restatement (Second), Judgments § 11. "Jurisdiction involves the power in a court to hear and determine the cause of action presented to it and its source is the constitutional and statutory provisions by which it is created. *Andrew Ansaldi Co.* v. *Planning & Zoning Commission*, 207 Conn. 67, 73, 540 A.2d 59 (1988) (*Shea*, *J.*, concurring), quoting *Connecticut State Employees Association, Inc.* v. *Connecticut Personnel Policy Board*, 165 Conn. 448, 456, 334 A.2d 909 (1973)." (Internal quotation marks omitted.) *State* v. *Carey*, supra, 305. Furthermore, article fifth, § 1, of the constitution of Connecticut provides that "[t]he powers and jurisdiction of [the] courts shall be defined by law." General Statutes § 51-164s provides in relevant part that "[t]he superior court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. . . ." Moreover, "[t]he question of whether the court has such jurisdiction . . . must be informed by the established principle that every presumption is to be indulged in favor of jurisdiction." (Internal quotation marks omitted.) *State* v. *Carey*,

supra, 305, quoting *Lauer* v. *Zoning Commission*, 220 Conn. 455, 460, 600 A.2d 310 (1991).

We conclude that, while this case is not a criminal prosecution, it is, nonetheless, a criminal case. This court, therefore, has jurisdiction to consider the appeal pursuant to § 54-96.[8]

II

The state next claims that the trial court improperly determined that the defendant's probation officer exceeded his authority in requiring the defendant to submit to urinalysis as a condition of probation.[9] The state specifically contends that requiring the defendant to submit to urinalysis under the circumstances of this case was reasonable, and that, in doing so, the probation

[8] On July 21, 1998, the defendant filed a motion to dismiss the state's appeal and a motion for permission to withdraw his appeal. The defendant claimed that the appeal was moot because his probationary term expired and he was released from probation on July 11, 1998. We denied the motions because, pursuant to General Statutes § 53a-31 (b), the period of the sentence had been stayed. Section 53a-31 (b) provides that "[i]ssuance of a warrant or notice to appear for violation pursuant to section 53a-32, shall interrupt the period of the sentence as of the date of such issuance until a final determination as to the violation has been made by the court."

[9] At trial, the defendant argued that the probation officer exceeded his statutory authority by imposing a condition of urinalysis that the trial court could not have imposed. This contention is without merit because drug testing could have been originally imposed by the trial court. Our Supreme Court has stated that "restrictions [on a probationer] are meant to assure that the probation serves as a period of genuine rehabilitation and that the community [not be harmed] by the probationer's being at large. . . . Moreover, had the trial court [imposed a condition of drug testing], it would not have unduly intruded on any constitutionally protected right to which the defendant would have been entitled." (Citation omitted.) *State* v. *Smith*, supra, 207 Conn. 170. The defendant also maintains that he was coerced into signing the probation form and accepting all the conditions of probation. This contention also fails, however, because our Supreme Court has stated that "while a potential probationer may reject the offer of probation, if he accepts it, he must accept all the conditions sought and cannot accept some and reject others." Id., 169, citing *People* v. *Oppenheimer*, 236 Cal. App. 2d 863, 866, 46 Cal. Rptr. 476 (1965), and N. Cohen & J. Gobert, The Law of Probation and Parole (1983) § 5.07.

NOTE: These pages (50 Conn. App. 193 and 194) are in replacement of the same numbered pages that appeared in the Connecticut Law Journal of 1 September 1998.

officer was acting within his statutory authority pursuant to General Statutes § 53a-30 (b).[10]

Specifically, § 53a-30 (b) provides that "[w]hen a defendant has been sentenced to a period of probation, the Office of Adult Probation may require that the defendant comply with any or all conditions which the court *could have imposed* under subsection (a) which are not inconsistent with any condition actually imposed by the court." (Emphasis added.) Additionally, our Supreme Court has noted that § 53a-30 (b) expressly allows either the judge or the probation department to impose reasonable conditions of probation and such an imposition is not an illegal delegation of the judicial function. *State* v. *Roberson*, 165 Conn. 73, 76 n.1, 327 A.2d 556 (1973). Moreover, "[s]tatutes authorizing probation, while setting parameters for doing so, have been very often construed to give the court broad discretion in imposing conditions." (Internal quotation marks omitted.) *State* v. *Pieger*, 240 Conn. 639, 647, 692 A.2d 1273 (1997); *State* v. *Smith*, supra, 207 Conn. 167. "[I]n determining whether a condition of probation [is proper] a reviewing court should evaluate the condition imposed under our Adult Probation Act in the following context: The conditions must be reasonably related to the purposes of the [Probation] Act. Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to

[10] General Statutes § 53a-30 (b) provides: "When a defendant has been sentenced to a period of probation, the Office of Adult Probation may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) which are not inconsistent with any condition actually imposed by the court." General Statutes § 53a-30 (a) provides in relevant part: "When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant . . . (7) refrain from violating any criminal law of the United States, this state or any other state . . . ."

probationers; and (3) the legitimate needs of law enforcement." (Internal quotation marks omitted.) *State* v. *Smith*, supra, 207 Conn. 170.

Here, the state maintains that urinalysis is a reasonable condition of probation because its purpose is to ensure that the defendant is complying with the terms of his probation. Our Supreme Court has stated that "[s]ince probation is, first and foremost, a penal alternative to incarceration—its objectives are to foster the offender's reformation and to preserve the public's safety—a sentencing court must have the discretion to fashion those conditions of probation it deems necessary to ensure that the individual successfully completes the terms of probation." Id., 168–69; *United States* v. *Williams*, 787 F.2d 1182, 1185 (7th Cir. 1986).

With respect to the extent that constitutional rights should be accorded to probationers, our Supreme Court has recognized that probationers have a diminished expectation of privacy because of their probationary status. *State* v. *Smith*, supra, 207 Conn. 174. "As with parolees, it may be crucial to the success of a probation program for a probation officer to have access to some information that a probationer may be unwilling to divulge and so a probation officer needs to be able to act in a manner that could not be tolerated if done by a policeman or other agent of the state with respect to an ordinary citizen under the fourth amendment." (Internal quotation marks omitted.) Id., 175.

"Although the fourth amendment generally requires a warrant based on probable cause before a search occurs, exceptions exist to this requirement when a legitimate governmental purpose makes the intrusion into one's privacy reasonable. . . . This is consistent with the diminished expectation of privacy that a probationer . . . is to expect in this governmental program

NOTE: These pages (50 Conn. App. 195 and 196) are in replacement of the same numbered pages that appeared in the Connecticut Law Journal of 1 September 1998.

to normalize his relations with society." (Citations omitted.) Id., 174; *United States* v. *Scott*, 678 F.2d 32 (5th Cir. 1982).

Regarding the legitimate needs of law enforcement, our Supreme Court has stated that "the state has a legitimate interest in accurate factfinding in probation revocation proceedings. This interest is clearly furthered by the admission of all reliable evidence, even that which is arguably obtained in violation of the fourth amendment. In addition, the state has an interest in deterring illegal searches and seizures. This interest, however, is not served by the exclusion of illegally seized evidence in probation revocation proceedings when the offending officer was unaware of the suspect's probationary status. We conclude that failure to apply the exclusionary rule in such circumstances is rationally related to legitimate state interests." *Payne* v. *Robinson*, 207 Conn. 565, 574–75, 541 A.2d 504, cert. denied, 488 U.S. 898, 109 S. Ct. 242, 102 L. Ed. 2d 230 (1988).

On the basis of our review of the record in this case, and our analysis of the factors in *Smith* that are requisite to determining whether the conditions of a defendant's probation are reasonable, we conclude that the urinalysis in this case was a reasonable condition of the defendant's probation and was, therefore, improperly suppressed by the trial court.

III

The state finally argues that the trial court improperly suppressed the defendant's urinalysis results in the probation revocation hearing and, as a result, improperly dismissed the violation of probation charge. Specifically, the state maintains that because the exclusionary rule does not apply to probation revocation proceedings, the test results were not illegally obtained and were, therefore, improperly suppressed by the trial

court.[11] Our analysis here is guided by our Supreme Court's decision in *Payne* v. *Robinson*, supra, 207 Conn. 565, where the court determined that the exclusionary rule did not apply to probation revocation hearings. In *Payne*, the probationer was stopped in his automobile by a police officer[12] who had information from a complainant that the probationer had threatened the complainant with a gun. While performing a warrantless search of the probationer's car, the officer found a loaded revolver under the driver's seat. The officer arrested the probationer on charges of threatening in violation of General Statutes § 53a-62 and of carrying a dangerous weapon in a motor vehicle in violation of General Statutes § 29-38. The probationer was subsequently charged with violating the conditions of his probation pursuant to General Statutes § 53a-32 (b).[13] The *Payne* court observed that "[t]he purpose of probation revocation proceedings is to determine whether a probationer is complying with the conditions of his probation. *United States* v. *Winsett*, 518 F.2d 51, 55 (9th Cir. 1975) . . . . In such proceedings, the government has an interest in accurate factfinding that is likely to be impaired when otherwise reliable and relevant evidence is excluded from the proceeding. . . . Against this interest, we must balance the deterrent effect that may result from applying the exclusionary rule to probation hearings under the facts of this case. We conclude that application of the rule would at best achieve only a marginal deterrent effect."[14] (Citations

[11] The state further argues that even if the urine sample was illegally obtained, the exclusionary rule is not applicable to a violation of probation hearing because such a proceeding is not a criminal prosecution.

[12] The fact that the probationer was on probation was not known to the police officer at the time of the stop.

[13] General Statutes § 53a-32 (b) provides in relevant part: "No such revocation shall be ordered, except upon consideration of the whole record and unless such violation [of probation] is established by reliable and probative evidence and by a preponderance of the evidence."

[14] The *Payne* court further concluded that while "the exclusionary rule does not apply to this case, we do not reach the question of whether the

NOTE: These pages (50 Conn. App. 197 and 198) are in replacement of the same numbered pages that appeared in the Connecticut Law Journal of 1 September 1998.

omitted.) *Payne* v. *Robinson*, supra, 571; *State* v. *Jacobs*, 229 Conn. 385, 391, 641 A.2d 1351 (1994). The *Payne* court noted that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . . Application of the rule is thus appropriate in circumstances in which this purpose is likely to be furthered." (Internal quotation marks omitted.) *Payne* v. *Robinson*, supra, 570; *United States* v. *Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).

Here, it was not a police officer, but, rather, the defendant's probation officer who required the defendant to submit a urine sample for drug testing. The fact that the probation officer obviously knew of the defendant's probationary status does not make this case analogous to that of a police officer who is aware that a person is on probation. There was no police participation in requiring the defendant to submit to urinalysis, and the probation officer was acting in accordance with conditions to which the defendant had agreed at the initial meeting of the defendant and the probation officer. Probation officers act under the auspices of the judicial branch in requiring the defendant to submit to conditions of probation. *State* v. *Jacobs*, supra, 229 Conn. 393. "Indeed, as *State* v. *Smith* . . . makes clear, the probation process operates as an arm of the judiciary, not of the police or prosecution." (Citation omit-

exclusionary rule would apply in probation revocation hearings when the police officer who had conducted the search was aware or had any reason to be aware of the suspect's probationary status. If illegally obtained evidence was admissible in such circumstances, the police officer might very well discount the fact that such evidence was inadmissible at a criminal trial, believing that incarceration of the probationer would instead be achieved through the revocation of his probation. Application of the exclusionary rule to the probation hearing might therefore contribute significantly to the deterrence of illegal searches." *Payne* v. *Robinson*, supra, 207 Conn. 573.

ted; internal quotation marks omitted.) Id., 393. Thus, when a probation officer demands a probationer's compliance with a condition of probation, he or she is acting as a representative of the judicial branch and not as a police officer. Applying the exclusionary rule to probation revocation hearings would make it more difficult for probation officers to perform properly their job of helping to ensure the rehabilitation of offenders. See *State* v. *Smith*, supra, 207 Conn. 177.

The purpose of the exclusionary rule, to discourage improper police procedure, would not be furthered by applying the exclusionary rule to probation revocation hearings and is inapplicable to the present case. Because *Payne* instructs that the exclusionary rule does not apply to probation revocation hearings, the trial court's suppression of the urinalysis results was improper.

The judgment is reversed and the case is remanded for a new probation revocation hearing at which the urinalysis results will be admissible.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN TYLER FUESSENICH (AC 16487)

Spear, Hennessy and Daly, Js.

Argued April 27—officially released September 1, 1998

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Litchfield, where the court, *Pickett, J.*, granted the defendant's motion to suppress certain evidence; thereafter, the court, *R. Walsh, J.*, granted the

NOTE: These pages (50 Conn. App. 199 and 200) are in replacement of the same numbered pages that appeared in the Connecticut Law Journal of 1 September 1998.

A.C. 16605
APPELLATE COURT
STATE OF CONNECTICUT
V.
JOHN TYLER FUESSENICH
SEPTEMBER 10, 1998

MOTION FOR RECONSIDERATION OR REARGUMENT EN BANC

The Defendant, **JOHN TYLER FUESSENICH**, by and through the undersigned attorneys, respectfully moves this Honorable Court for reconsideration and reargument en banc in the above-captioned case. In support of this Motion, he states the following grounds:

I. Brief History of the Case:

On October 1, 1996, the trial court (Walsh, J.) dismissed the State's information which charged the Defendant with violating his probation by possessing narcotics. This dismissal occurred as a result of the trial court's (Pickett, J.) decision to exclude from evidence the results of a urine test of the Defendant. The State

appealed the trial court's suppression of the Defendant's urine test.

This Court (Spear, Hennessy and Daly, Js.) heard oral argument on April 27, 1998. Prior to the Court's decision being issued, the Defendant's probationary term expired and he was released from probation. See Letter from Senior Probation Officer Michael D. Gagne, dated July 21, 1998, attached hereto as Exhibit A. The Defendant filed a motion to dismiss the appeal on the ground that he had been discharged from his term of probation. On July 22, 1998, the next day, the Court summarily denied the motion.

This Court issued its decision on September 1, 1998. State v. Fuessenich, 50 Conn. App. 187 (1998). The Court concluded that the Defendant's probation officer had not exceeded his authority in requiring the Defendant to submit to urinalysis, and that pursuant to

the Fourth Amendment to the United States Constitution and the Connecticut Supreme Court's decision in Payne v. Robinson, 207 Conn. 565, cert. denied, 488 U.S. 898 (1988), the exclusionary rule was not applicable to the facts of this case. The Defendant respectfully requests this Court to reconsider its decision on these issues.

II. Grounds For Requesting Reconsideration Or Reargument And Facts Relied Upon:

A. This Court Erred In Not Dismissing The State's Appeal After The Defendant Completed His Probationary Period.

Because the Defendant was released from his probationary term on July 11, 1998, this appeal should have been dismissed as moot. "It is a well settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction". Delevieleuse v. Manson, 184 Conn. 434, 436, 439 A.2d 1055 (1981) (citations omitted). Furthermore, as recently recognized

by this Court:

> Justiciability requires ... that there be an actual controversy between or among the parties to the dispute: Courts exist for the determination of actual and existing controversies....[W]here the question presented is purely academic, we must refuse to entertain the appeal. A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists.

Board of Education of the Town of Stafford v. State Board of Education, 243 Conn. 772, 776-77, 709 A.2d 510 (1998).

In the instant appeal, an intervening circumstance occurred to void the controversy between the parties: the Defendant's probationary term expired and he was discharged from probation. Accordingly, the question presented was no longer justiciable, and consequently, the appeal should have been dismissed prior to the issuance of the Court's decision.

B. Because This Court Failed To Determine If The State's Action, In Filing A Civil Appeal While The Trial Court Was Considering The State's Request For Permission To Appeal Pursuant To Conn. Gen. Stat. § 54-96, Deprived The Trial Court Of Jurisdiction Over The State's Criminal Appeal, The Decision Of This Court Should Be Reconsidered.

This Court concluded that a probation revocation proceeding was a criminal case, from which the State could appeal pursuant to Conn. Gen. Stat. § 54-96. Fuessenich, 50 Conn. App. at 193. The Court failed to address the Defendant's claim that the State, by filing a civil appeal while the trial court was determining if an appeal could be taken pursuant to § 54-96, deprived the trial court of jurisdiction over the criminal appeal.[12]

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[12] Procedurally, the State requested permission to appeal the trial court's (Pickett, J.) decision suppressing the results of the Defendant's urinalysis. The Defendant objected to that request, arguing that because this was not a criminal case, the trial court lacked the authority to grant permission to appeal under § 54-96. While the trial court (Walsh, J.) was considering whether the State could take a criminal appeal, the State filed a civil appeal

In Meyers v. Cornwell Quality Tools, Inc., No. CV 9046316S, 1994 WL 563525 (Conn. Super. 1994), aff'd, 41 Conn. App. 19, 674 A.2d 444 (1996), attached hereto as Exhibit B, the trial court found that where an appeal had been filed, the jurisdiction of the trial court was sharply curtailed. The court stated that:

> [t]he majority of state courts take the view that once an appeal is filed the trial court is divested of jurisdiction to hear or rule upon a motion which attempts to vacate the very order appealed from, and some of these courts allow an application to the appellate court for a remand for consideration of a motion to vacate a judgment which is then pending for review by the appellate court ... The general principle that is universally recognized by the courts is that once an appeal is perfected, jurisdiction over the case is transferred from the trial court to the appellate court with respect to the substantive issues that are the subject of the appeal (internal citations omitted).

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of the same issue. This civil appeal, the Defendant claimed, deprived the trial court of jurisdiction over the State's criminal appeal, thereby voiding the trial court's determination that the State could appeal under § 54-96.

The State filed its civil appeal before the trial court concluded whether the State was allowed to bring a criminal appeal under Conn. Gen. Stat. § 54-96. Therefore, the trial court was deprived of jurisdiction over the State's criminal appeal by the filing of the State's civil appeal. Because this Court did not respond to the Defendant's argument, this matter should be reconsidered by this Court.

C. Because This Court Improperly Determined That Urinalysis Was A Reasonable Condition Of The Defendant's Probation, The Decision Should Be Reconsidered.

The trial court (Picket, J.) concluded that drug testing was not imposed as a condition of probation, nor was it a condition which "the court 'could have' imposed." See State v. Fuessenich, 16 Conn. L. Rptr. No. 11, 339, 341 (1996), attached hereto as Exhibit C. In reaching the conclusion that "urinalysis in this case

was a reasonable condition of the defendant's probation," State v. Fuessenich, 50 Conn. App. at 196, this Court improperly ignored the trial court's finding.

In determining that urinalysis was a reasonable condition of the Defendant's probation, this Court relied on Conn. Gen. Stat. §53a-30(b) which provides that:

> when a defendant has been sentenced to a period of probation, the Office of Adult Probation may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) which are not inconsistent with any condition actually imposed by the court. (emphasis added).

Drug testing, as ordered by the Office of Adult Probation (OAP), was clearly inconsistent with the orders of the trial court. The trial court specifically stated that drug testing was not imposed as a condition of probation, nor was it a condition which could have been imposed. Because this Court impermissibly failed to consider the trial court's explicit holding, this matter should be

reconsidered.

D. Because This Court Failed To Consider The Defendant's State Constitutional Analysis And Failed To Consider Relevant Precedent, The Defendant's Argument That The Exclusionary Rule Can Apply To Probation Revocation Proceedings Should Be Reconsidered.

This Court, in rejecting the Defendant's argument that the exclusionary rule should apply in this case, concluded that:

> [t]he purpose of the exclusionary rule, to discourage improper police procedure, would not be furthered by applying the exclusionary rule to probation revocation hearings and is inapplicable to the present case. Because Payne instructs that the exclusionary rule does not apply to probation revocation hearings, the trial court's suppression of the urinalysis results was improper.

Fuessenich, 50 Conn. App. at 199. In reaching this conclusion, this Court erred by: (1) basing its conclusion on the Fourth Amendment, thereby ignoring the holding of the trial court and the analysis provided by the Defendant -- both of which relied on Article I, § 7 of the

Connecticut Constitution; and, (2) ignoring the holding of United States v. Rea, 678 F.2d 382 (2d Cir. 1982), which was cited with approval by the Connecticut Supreme Court in Payne.

The trial court, in excluding the urinalysis at the Defendant's probation revocation proceeding, based its decision on Article I, § 7 of the Connecticut Constitution. State v. Fuessenich, 16 Conn. L. Rptr. at 341-42 ("the search and seizure of defendant's urine was an unreasonable search and seizure in violation of Article I, § 7 of the Connecticut Constitution"; "the court finds that the evidence against the defendant was obtained in excess of statutory authority and in violation of his right to be free from unreasonable searches and seizure under Article I, § 7 of the Connecticut Constitution"). Similarly, in section II.B.2 (which was entitled "Pursuant To Article I, Section 7 Of The Connecticut Constitution

The Exclusionary Rule Should Apply To Probation Revocation Proceedings") of his Appellee's Brief, the Defendant provided an eight page analysis of the applicability of the exclusionary rule to probation revocation proceedings under the Connecticut Constitution. See Brief Of Defendant-Appellee at 15-23.

This Court, in concluding that the exclusionary rule does not apply to probation revocation proceedings was "guided by our Supreme Court's decision in Payne v. Robinson." Fuessenich, 50 Conn. App. at 196. The decision in Payne was based on the protections provided by the Fourth Amendment. See Payne, 207 Conn. at 570 ("In the case at hand, the petitioner's claim implicates his right to be free from unreasonable searches, guaranteed by the fourth and fourteenth amendments to the United States constitution" (emphasis added)). Our Supreme Court has continually noted that the protections afforded

Connecticut citizens under Article I, § 7 of the Connecticut Constitution are broader than those provided by the Fourth Amendment to the United States Constitution. See State v. Marsala, 216 Conn. 150 (1990). Because Payne was decided under the Federal Constitution, it should not have been used to guide the Court's decision in this matter. Therefore, this Court should reconsider its decision and determine if the exclusionary rule can apply to probation revocation proceedings under the Connecticut Constitution.

Finally, this Court erred in failing to consider the holding of United States v. Rea, 678 F.2d 382 (2d Cir. 1982), which was cited with approval by the Connecticut Supreme Court in Payne.[13] In Rea, the Second Circuit

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[13] In leaving open the question of whether the exclusionary rule would apply if the police officer who committed the offending search was aware of the probationer's status, the Supreme Court in Payne stated

Court of Appeals concluded that:

> evidence seized by a probation officer in an illegal warrantless search of a probationer's home is inadmissible at a subsequent probation revocation proceeding ... the warrant requirement will not interfere significantly with either of the dual functions of probation. Since a warrant can be obtained ex parte, and generally quickly, and since in exigent circumstances the normal exceptions to the warrant requirement would apply, the law enforcement function of probation officers is unlikely to be hampered ... In addition, the rehabilitative goals of probation are not apt to be furthered by either the threat or the practice of unauthorized warrantless searches. On the other hand, a probation officer who seeks to discover and seize evidence for use in a probation revocation hearing is very likely to be deterred from proceeding without a warrant if the officer knows that evidence so seized is apt to be excluded from the very proceeding with which he is concerned.

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that if the officer were aware of the probationer's status "[a]pplication of the exclusionary rule to the probation hearing might therefore contribute significantly to the deterrence of illegal searched. See ... United States v. Rea, 678 F.2d 382, 389-90 (2d Cir. 1982)." In citing Rea with approval, it must be assumed that the Connecticut Supreme Court was aware that its holding applied specifically to probation officers.

Id. at 388-90. This holding, which was cited with approval by the Connecticut Supreme Court in Payne is in direct contradiction to the decision of this Court. Fuesenich, 50 Conn. App. at 198-99. Therefore, this Court should reconsider its decision to determine if Rea is distinguishable from the instant matter or if it controls the determination.

III. Legal Grounds Relied Upon:

In support of his argument, the Defendant relies upon Practice Book §§ 71-5 et seq., and Article I, Section 7 of the Connecticut Constitution.

WHEREFORE, the Defendant respectfully requests that this Motion be granted.

THE DEFENDANT,

BY_____
HUBERT J. SANTOS
HOPE C. SEELEY
PATRICK S. BRISTOL
SANTOS & SEELEY, P.C.
51 Russ Street
Hartford, CT 06106
(860) 249-6548

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been mailed to the following counsel of record this 10th day of September, 1998:

Rita M. Shair
Assistant State's Attorney
Appellate Bureau
Office Of The Chief State's Attorney
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HUBERT J. SANTOS

NO. A.C. 16605
STATE OF CONNECTICUT
APPELLATE COURT
STATE OF CONNECTICUT
V.
JOHN TYLER FUESSENICH
NOVEMBER 17, 1998

O R D E R

THE MOTION OF THE DEFENDANT FILED SEPTEMBER 10, 1998 FOR RECONSIDERATION OR REARGUMENT EN BANC HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.*

*SEE NOVEMBER 17, 1998 CONNECTICUT LAW JOURNAL.

BY THE COURT,
/s/
ASSISTANT CLERK-APPELLATE

NOTICE SENT: NOVEMBER 19, 1998
RITA M. SHAIR, A.S.A.
SANTOS & SEELEY, P.C.
HON. RICHARD A. WALSH
CLERK, LITCHFIELD J.D.
(CR1873111)
REPORTER OF JUDICIAL DECISIONS

ct #208

A.C. 16605
APPELLATE COURT
STATE OF CONNECTICUT
V.
JOHN TYLER FUESSENICH
DECEMBER 9, 1998

PETITION FOR CERTIFICATION WITH ATTACHED APPENDICES

In accordance with Section 84-1 et seq. of the Rules of Appellate Procedure, the Defendant petitions the Supreme Court for certification to appeal from the judgment of the Appellate Court in this case.

1. Questions presented for review

a. Whether The Appellate Court Incorrectly Determined That The Exclusionary Rule Does Not Apply To Probation Revocation Proceedings Under The State And Federal Constitutions?

b. Whether The Appellate Court Incorrectly Determined That A Probation Revocation Hearing Was A Criminal Case That Could Be Appealed Pursuant To Conn. Gen. Stat. § 54-96, And If So Whether The Appellate Court Correctly Determined That The State's Filing Of A Civil Appeal Did Not Deprive The Appellate Court Of Jurisdiction Over The Criminal Matter?

c. Whether The Appellate Court Incorrectly Determined That Drug Testing Was A Proper Condition Of The Defendant's Probation And Incorrectly Determined That This Condition Was Reasonable?

d. Whether The Appellate Court Incorrectly Failed To Dismiss The State's Appeal After The Defendant Completed His Period Of Probation?

2. Basis for certification

With regard to the first question presented for review, the Appellate Court has decided a question of substance not theretofore determined by the Supreme Court and has decided it in a way probably not in accord with the applicable decisions of the Supreme Court and Article I, § 7 of the Connecticut Constitution.

With regard to the second question presented for review, the Appellate Court has decided a question of substance not theretofore determined by the Supreme Court.

With regard to the third question presented for review, the Appellate Court has decided a question of substance not theretofore determined by the Supreme Court and has decided it in a way probably not in accord with the applicable decisions of the Supreme Court and Article I, § 7 of the Connecticut Constitution.

With regard to the fourth question presented for review, the Appellate Court has decided a question of substance not theretofore determined by the Supreme Court and a question of great public importance is involved.

3.Summary of Case

On July 11, 1995, the Defendant pleaded guilty to three counts of tampering with evidence in violation of General Statutes § 53a-115. State v. Fuessenich, 50 Conn. App. 187, 189 (1998). He was sentenced to four years imprisonment with execution suspended and three years probation. Id. The trial court issued a probation order that

provided that the Defendant: "during the probationary term fixed shall abide by the written statement of the conditions of probation furnished by the probation officer and the instructions given regarding the same." Id. The following day, the Defendant's probation officer required him to sign a form that advised him of his rights and duties with respect to his probation, as well as the conditions of his probation. Id. Included in that form was the requirement that the Defendant submit to urinalysis and/or drug testing as required by the probation officer. Id. This condition was not ordered by the trial court. Id.[1]

The probation officer later required the Defendant to provide a specimen for urinalysis, which tested positive for cocaine. Id. at 190. The probation officer then obtained an arrest warrant for the Defendant for the alleged violation

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[1] The trial court concluded that this was not a condition of probation which it could have ordered.

of the condition that he "not violate any criminal law." Id. The Defendant was charged with violating the terms of his probation, and later filed a motion to dismiss charge and to exclude evidence of the test results. Id. The Defendant argued that the requirement that he submit to random drug testing violated his right to be free from unreasonable searches and seizures as provided in the Fourth Amendment to the United States Constitution and Article First, §§ 7, 8 and 20, of the Constitution of Connecticut. Id. The trial court suppressed the results of the urinalysis after concluding that "the evidence against the Defendant was obtained in excess of statutory authority and in violation of his right to be free from unreasonable searches and seizure under article first, § 7, of the Constitution of Connecticut." Id. Thereafter, the State represented that it had no other evidence and the trial court, Walsh, J., dismissed the violation of probation charge. Id. at 191. The

trial court granted the State's motion for permission to appeal the trial court's ruling. Id.

The Appellate Court (Spear, Hennessy and Daly, Js.) heard oral argument on April 27, 1998 and on July 21, 1998 the Defendant filed a Motion to Dismiss this appeal because he had completed his probationary period. This motion was denied, and the Appellate Court issued its decision on September 1, 1998. State v. Fuessenich, 50 Conn. App. 187 (1998); see Appendix A. The Court reversed the holding of the trial court holding: (1) an appeal was proper pursuant to Conn. Gen. Stat. § 54-96; (2) that the probation officer had not exceeded his authority; and, (3) under the Fourth Amendment to the United States Constitution, the results of the urinalysis should not have been suppressed. Fuessenich, 50 Conn. App. at 191-99. The Defendant filed a Motion for Reargument on September 10, 1998, which was denied on

November 17, 1998.

4.Argument

A. The Appellate Court Incorrectly Determined That The Exclusionary Rule Does Not Apply To Probation Revocation Proceedings Under The State And Federal Constitutions.

The Appellate Court concluded, pursuant to Payne v. Robinson, 207 Conn. 565, cert. denied, 488 U.S. 898 (1988), the exclusionary rule would not apply to the facts of this case. In reaching this conclusion, the Court erred by: (1) basing its conclusion on the Fourth Amendment, thereby ignoring the holding of the trial court and the analysis provided by the Defendant -- both of which relied on Article I, § 7 of the Connecticut Constitution; and, (2) ignoring the holding of United States v. Rea, 678 F.2d 382 (2d Cir. 1982), which was cited with approval by this Court in Payne v. Robinson, 207 Conn. 565, cert. denied, 488 U.S. 898 (1988).

The trial court, in excluding the urinalysis at the Defendant's probation revocation proceeding, based its decision on Article I, § 7 of the Connecticut Constitution. Similarly, in his brief to the Appellate Court, the Defendant provided an eight page analysis of the applicability of the exclusionary rule to probation revocation proceedings under the Connecticut Constitution.

The Appellate Court, in concluding that the exclusionary rule does not apply to probation revocation proceedings was "guided by our Supreme Court's decision in Payne v. Robinson." Fuessenich, 50 Conn. App. at 196. The decision in Payne was based on the protections provided by the Fourth Amendment. Because Payne was decided under the Federal Constitution, it should not have been used to guide the Court's decision in this matter.[2]

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[2] This Court has continually noted that the protections afforded Connecticut citizens under Article I,

Finally, the Appellate Court erred in failing to consider the holding of United States v. Rea, 678 F.2d 382 (2d Cir. 1982), which was cited with approval by the Connecticut Supreme Court in Payne.[3] In Rea, the Second Circuit Court of Appeals concluded:

> evidence seized by a probation officer in an illegal warrantless search of a probationer's home is inadmissible at a subsequent probation revocation proceeding ... the warrant requirement will not

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§ 7 of the Connecticut Constitution are broader than those provided by the Fourth Amendment to the United States Constitution. See State v. Marsala, 216 Conn. 150 (1990).

[3] In leaving open the question of whether the exclusionary rule would apply if the police officer who committed the offending search was aware of the probationer's status, this Court in Payne stated that if the officer were aware of the probationer's status "[a]pplication of the exclusionary rule to the probation hearing might therefore contribute significantly to the deterrence of illegal searched. See ... United States v. Rea, 678 F.2d 382, 389-90 (2d Cir. 1982)." In citing Rea with approval, it must be assumed that this Court was aware that its holding applied specifically to probation officers.

> interfere significantly with either of the dual functions of probation ... In addition, the rehabilitative goals of probation are not apt to be furthered by either the threat or the practice of unauthorized warrantless searches. On the other hand, a probation officer who seeks to discover and seize evidence for use in a probation revocation hearing is very likely to be deterred from proceeding without a warrant if the officer knows that evidence so seized is apt to be excluded from the very proceeding with which he is concerned.

Id. at 388-90. This holding is in direct contradiction to the decision of this Court. Fuesenich, 50 Conn. App. at 198-99. Therefore, this Court should grant certification to fully consider the Defendant's argument.

B. The Appellate Court's Conclusion That This Appeal Was Proper Under Conn. Gen. Stat. § 54-96 Was In Error And The Appellate Court's Failure To Consider The Defendant's Argument That The State's Filing Of A Civil Appeal Deprived The Appellate Court Of Jurisdiction Over The Criminal Matter Was In Error.

The Appellate Court concluded that a probation revocation proceeding was a criminal case, from which the State could appeal pursuant to Conn. Gen. Stat. § 54-96.

Fuessenich, 50 Conn. App. at 193. As the Defendant argued, a probation revocation proceeding contains both civil and criminal elements[4] and should therefore not be considered a "criminal case" from which an appeal would be proper under § 54-96. Instead, a probation revocation proceeding should be considered a quasi-criminal hearing from which no appeal may be brought under § 54-96.

The Appellate Court also failed to address the Defendant's claim that the State, by filing a civil appeal while the trial court was determining if an appeal could be taken pursuant to § 54-96, deprived the trial court of jurisdiction over the criminal appeal.[5] In Meyers v.

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[4] A probation revocation hearing "does not require all of the procedural components associated with an adversary criminal proceeding." State v. Smith, 207 Conn. 152, 176-77 (1988).

[5] Procedurally, the State requested permission to appeal the trial court's (Pickett, J.) decision suppressing the results of the Defendant's urinalysis. The Defendant

Cornwell Quality Tools, Inc., No. CV 9046316S, 1994 WL 563525 (Conn. Super. 1994), aff'd, 41 Conn. App. 19, 674 A.2d 444 (1996), the trial court found that where an appeal had been filed, the jurisdiction of the trial court was sharply curtailed. The court stated that:

> The general principle that is universally recognized by the courts is that once an appeal is perfected, jurisdiction over the case is transferred from the trial court to the appellate court with respect to the substantive issues that are the subject of the appeal (internal citations omitted).

The State filed its civil appeal before the trial court concluded whether the State was allowed to bring a criminal appeal under Conn. Gen. Stat. § 54-96. Therefore,

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objected to that request, arguing that because this was not a criminal case, the trial court lacked the authority to grant permission to appeal under § 54-96. While the trial court (Walsh, J.) was considering whether the State could take a criminal appeal, the State filed a civil appeal of the same issue. This civil appeal, the Defendant claimed, deprived the trial court of jurisdiction over the State's criminal appeal, thereby voiding the trial court's determination that the State could appeal under § 54-96.

the trial court was deprived of jurisdiction over the State's criminal appeal by the filing of the State's civil appeal. Because the Appellate Court did not respond to the Defendant's argument, certification should be granted in this matter.

C. The Appellate Court Incorrectly Determined That Drug Testing Was A Proper Condition Of The Defendant's Probation And Incorrectly Determined That Such Condition Was Reasonable.

As the Defendant noted numerous times in his brief to the Appellate Court, the sentencing court (Pickett, J.) did not order drug testing as a condition of the Defendant's probation and went on to conclude that drug testing was not a condition which it could have included on the Defendant's probation.[6] In considering whether the Defendant's probation officer had acted reasonably in

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[6] Judge Pickett acted as both the sentencing court and the court which suppressed the urinalysis results.

forcing the Defendant to submit to urinalysis, the Appellate Court relied on 53a-30(b) which allows a probation officer to require a defendant to comply with any conditions which the court could have imposed if those conditions are not inconsistent with the conditions imposed by the court. Fuessenich, 50 Conn. App. at 194. Urinalysis was inconsistent with the conditions imposed by the sentencing court. The sentencing court stated that it had no basis upon which to require drug testing. Therefore, the addition of drug testing by the probation officer clearly conflicted with the conditions imposed by the sentencing court and should have been disallowed.

The Appellate Court went on to discuss whether drug testing would be allowed under State v. Smith, 207 Conn. 152, 170 (1988), in which case this Court considered whether certain probation conditions were reasonably related to the defendant's rehabilitation.

Fuessenich, 50 Conn. App. at 194. The Court then conducted a discussion regarding the Fourth Amendment rights of probationers; this discussion never considered the rights of probationers under the State Constitution, nor did it ever mention the fact that drug testing was a condition wholly in conflict with the conditions ordered by the sentencing court. After ignoring these relevant considerations, the Appellate Court concluded that urinalysis was a "reasonable condition of the defendant's probation and was, therefore, improperly suppressed by the trial court." Id. at 196. This conclusion is clearly in error because the Appellate Court never considered the findings of the sentencing courts, not did it consider the application of the State Constitution to the Defendant's claim. Therefore, this Court should grant certification to consider the Defendant's claim.

D. The Appellate Court Erred In Refusing To

Dismiss The Defendant's Appeal After His Period Of Probation Expired.

Because the Defendant was released from his probationary term on July 11, 1998, this appeal should have been dismissed as moot. "It is a well settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction". Delevieleuse v. Manson, 184 Conn. 434, 436, 439 A.2d 1055 (1981) (citations omitted). Furthermore, as recently recognized by this Court:

> Justiciability requires ... that there be an actual controversy between or among the parties to the dispute: Courts exist for the determination of actual and existing controversies....[W]here the question presented is purely academic, we must refuse to entertain the appeal. A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists.

Board of Education of the Town of Stafford v. State Board of Education, 243 Conn. 772, 776-77, 709 A.2d 510

(1998).

In the instant appeal, an intervening circumstance occurred to void the controversy between the parties: the Defendant's probationary term expired and he was discharged from probation. Accordingly, the question presented was no longer justiciable, and consequently, the appeal should have been dismissed prior to the issuance of the Court's decision.[7]

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[7] The Appellate Court, in an attempt to respond to the Defendant's Motion to Dismiss, added a footnote to the original decision. See State v. Fuessenich, 50 Conn. App. at 193 n.8. In that footnote, the Court stated that "pursuant to General Statutes § 53a-31(b), the period of the sentence has been stayed." Under Conn. Gen. Stat. § 53a-31(b), "[i]ssuance of a warrant ... for violation pursuant to section 53a-32, shall interrupt the period of sentence as of the date of such issuance until a final determination as to the violation has been made by the court" (emphasis added). A final determination was made in this case -- the trial court dismissed the charge pending against the Defendant. Therefore, his probation continued and should have ended before this appeal was decided by the Appellate Court. It also must be noted that the Defendant continued to report to the Office of

BY\s_____
HUBERT J. SANTOS
HOPE C. SEELEY
SANTOS & SEELEY, P.C.
51 Russ Street
Hartford, CT 06106

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing Petition With Attached Appendices has been mailed to the following counsel of record this 9th day of December, 1998:

Rita M. Shair
Assistant State's Attorney
Appellate Bureau
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
tel. 258-5800
Juris No. 401857

\s_____
HUBERT J. SANTOS

Adult Probation after the charges were dismissed.

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-98-0220

State of Connecticut
v.
John Tyler Fuessenich

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (50 Conn. App. 187 [AC 16605]), it is hereby ordered that said petition be, and the same is hereby denied.

Borden and Palmer, Js. did not participate in the consideration or decision of this petition for certification.

BY THE COURT,

/s/
ASSISTANT CLERK-APPELLATE

Dated: January 12, 1999
Notice sent: 1/13/99
Clerk, Superior Court, Litchfield - CR91 0073111T
Clerk, Appellate Court
Reporter of Judicial Decisions
SAO
Santos & Seeley, P.C.

Office of the Chief State's Attorney-Appellate Bureau

Hubert J. Santos and Hope C. Seeley in support of petition; Rita M. Shair, Assistant State's Attorney, in opposition.

State v. John Tyler FUESSENICH
Superior Court of Connecticut.
March 19, 1996.
MEMORANDUM OF DECISION

PICKETT, J.

Facts

On July 11, 1995, the defendant, John Fuessenich, pleaded guilty to three counts of tampering with evidence in violation of General Statutes § 53a-115 in the Litchfield Superior Court. The Honorable Walter M. Pickett, Jr. sentenced the defendant to four years, execution suspended, with three years of probation. On July 12, 1995, the defendant met with his assigned probation officer, who required the defendant to sign a form setting forth the conditions of his probation and advising him of his rights and duties with respect to his probation. [FN1] The following day, the clerk of the court issued a probation order requiring the defendant, inter alia, to "abide by the written statement of the conditions of probation furnished by the probation officer and the instructions given regarding the same." [FN2] On September 26, 1995, defendant's probation officer applied for a warrant for the defendant's arrest based on an alleged violation of his probation. Specifically, the probation officer alleged that the defendant, who had been required to submit to urinalysis on August 14, 1995, tested positive for cocaine use in violation of the probation condition that he "not violate any criminal law." The defendant is now charged with violating the terms of his probation.

FN1. The standard form advised the defendant of his rights and duties with respect to his probation and set forth 10 conditions of probation. The conditions relevant for purposes of this motion are: "(1) Do not violate any criminal law of the United States, this state or any other state or territory"; and "(7) Submit to any medical and/or psychological examination, urinalysis, and/or counseling sessions as required by the Court and submit to any alcohol and/or drug testing required by the Probation Officer."

FN2. The defendant claims that he never received such an order.

On February 9, 1996, the defendant filed a motion to dismiss the violation of probation charges and to exclude evidence of the test results, arguing in his memoranda of law that there was a defect in the institution of prosecution and that the probation officer both exceeded his statutory authority and violated defendant's state and federal constitutional rights in requiring him to submit to urinalysis. [FN3] In support of his argument, the defendant points out that the court itself did not impose drug testing in its order, that there is no evidence in the sentencing record relating to drug use or abuse by the defendant, and that drug testing is not otherwise reasonably related to his rehabilitation for the crime of tampering with evidence. Thus, according to the defendant, the probation officer had no authority to impose drug testing upon him as a condition of his probation.

FN3. The defendant argues that requiring him to

> submit to urinalysis under the circumstances of this case violated his right to be free from unreasonable searches and seizures under the fourth amendment to the U.S. Constitution and Article I §§ 7, 8, and 20 of the Connecticut Constitution.

In its opposition brief, the state argues that the probation officer was within his statutory authority, pursuant to General Statutes § 53a-30(b), in requiring the defendant to submit to drug testing and/or urinalysis because there was ample information before the sentencing court indicating drug use by the defendant such that the court could have required drug testing and because the drug testing requirement imposed by the probation officer is not inconsistent with the court's order. [FN4]

> FN4. The state also argues that Payne v. Robinson, 207 Conn. 565, 541 A.2d 504, cert. denied, 488 U.S. 898, 109 S.Ct. 242, 102 L.Ed.2d 230 (1988), prevents the use of the exclusionary rule at violation of probation hearings. The court finds that this case does not fall within the parameters of Payne.

I.

A.

The defendant has moved to dismiss the case against him, pursuant to Practice Book § 815(1), on the ground that requiring him to submit to urinalysis in violation of statutory authority deprived him of his constitutional right to be free from unreasonable searches and seizures and constitutes a defect in the institution of prosecution. The

defendant has also moved to exclude all evidence regarding the urinalysis test and results thereof. Since the defendant moves to exclude the admission of evidence based on alleged violations of the federal and state constitution, the court will treat the evidentiary portion of the defendant's motion as a motion to suppress pursuant to Practice Book § 821.

"Practice Book [§]815 authorizes a motion to dismiss ... for defenses or objections based on defects in the initiation of a prosecution, absence of jurisdiction, the presence of constitutional or statutory error that might obviate the necessity for a trial, or the lack of cause or evidence to justify the bringing or continuing of prosecution. It also contains a provision that defenses or objections based on 'any other grounds' may be raised by a motion to dismiss." State v. Talton, 209 Conn. 133, 138-39, 547 A.2d 543 (1988). "The tenor and apparent purpose of 815 is to authorize a motion to dismiss by a defendant for the specific reasons stated in that section or for any other grounds that constitute defects inherent in the initiation or prosecution of a criminal case that would prevent the state from successfully concluding a prosecution that it desires to continue." Id., 139.

A motion to suppress potential testimony or other evidence shall be granted by the judicial authority "if he finds that suppression is required under the constitution or laws or the United States or the state of Connecticut." Practice Book § 821. Practice Book § 821 "incorporates the existing standards of search and seizure jurisprudence, as set forth by [the Connecticut Supreme] [C]ourt, our Appellate Court and the United States Supreme Court,

leaving to trial courts the task of determining whether suppression is required in a particular case." State v. Marsala, 216 Conn. 150, 156, 579 A.2d 58 (1990). "If the provisions of either [the state or federal] constitution, as currently interpreted, require the suppression of any evidence seized, 821 merely directs the judicial authority to carry forth that suppression." Id.

B.

General Statutes § 53a-30 [FN5] sets forth the conditions of probation which may be imposed by a sentencing court and by the Office of Adult Probation. Subsection (a) applies to the court, and provides, in pertinent part: "When imposing sentence of probation ... the court may, as condition of the sentence, order that the defendant: (2) undergo medical or psychiatric treatment and remain in a specified institution, when required for that purpose; ... (7) refrain from violating any criminal law of the United States, this state or any other state ... [.]" Subsection (b) of the statute, which applies to the Office of Adult Probation, provides: "When a defendant has been sentenced to a period of probation, the Office of Adult Probation may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) which are not inconsistent with any conditions actually imposed by the court."

> FN5. General Statutes § 53a-30 has been repealed and replaced by Public Act 95-142, Sec.3. The 1995 Act is nearly identical to the former § 53a-30, except for the addition of one sentence relevant to sexual offenders.

Thus, language relevant to this case has not been affected.

The July 13, 1995 probation order issued by the court provides, in pertinent part: "It is ordered and adjudged that: ... (b) Said defendant during the probationary term fixed shall abide by the written statement of the conditions of probation furnished by the probation officer and the instructions given regarding the same." There were no other conditions listed in the space provided for "special conditions of probation." The probation office's form, signed by the defendant on July 12, 1995, provides, in pertinent part: "(7) Submit to any medical and/or psychological examination, urinalysis, and/or counselling sessions as required by the Court and submit to any alcohol and/or drug testing required by the Probation Officer." (Emphasis added.) The form also stated, inter alia, that the defendant could be arrested and his probation revoked by not complying with the conditions of probation listed on the form.

The defendant argues that General Statutes § 53a-30 precluded the probation officer from imposing the condition that the defendant submit to urinalysis because the court itself did not require drug testing as a condition of defendant's probation, because there was no evidence in the record of drug use by the defendant, and because such a requirement otherwise has no reasonable relationship to the crime of tampering with evidence for which he was charged. Thus, the defendant argues that the probation officer exceeded his statutory authority by requiring the defendant to submit to drug testing and/or urinalysis, as it was not a requirement the court "could have imposed."

[FN6]

> FN6. The defendant also argues that because the court did not impose a drug testing requirement, it thereby evinced a clear intent that such a requirement was unnecessary. The court disagrees with this argument, which rests on the assumption inclusio unius est expressio alterius, and will not decide the validity of defendant's statutory argument on this basis.

The state argues that the sentencing court had before it ample information regarding the use and/or abuse of drugs by the defendant, and that the court therefore "could have" imposed drug testing/urinalysis upon the defendant at the time of sentencing. If the court "could have" imposed drug testing upon the defendant, the Office of Adult Probation could thereafter have imposed such testing as long as it was "not inconsistent with any conditions actually imposed by the court." General Statutes § 53a-30(b). In support of its contention that the court had ample information concerning drug use by the defendant at the time of sentencing and could therefore have imposed drug testing upon him, the state claims the court should have known about defendant's drug use because the same court had presided over defendant's earlier murder trial at which the state's theory was that defendant Fuessenich killed the victim because he was going to divulge the defendant's drug involvement to the state police. [FN7] Thus, the state contends the court knew or should have known about defendant's alleged drug use when it sentenced the defendant at a later date on the tampering charges and therefore "could have" required drug testing as a condition of probation. Thus, the state

posits that because the court "could have" imposed drug testing, the probation officer was within his statutory powers, pursuant to General Statutes § 53a-30(b), when he required a condition of probation "which the court could have imposed under subsection (a)" of the statute and which was not inconsistent with any condition actually imposed by the court. (Emphasis added.)

> FN7. Prior to being charged with the crime of tampering with evidence, the defendant had been charged with, and tried upon, the crime of murder. His first trial ended in a mistrial, and his second trial resulted in an acquittal. The tampering charges relate to the murder charge in that they arose from the defendant's alleged "cleaning up" of the crime scene at which the murder took place.

Upon examination of the sentencing court record, the court finds that there is no evidence of any drug use or abuse by the defendant. Indeed, there is no mention of drugs in any context, and the state apparently did not raise such an issue at the hearing. [FN8] Although the state claims that there was evidence in defendant's murder trials that he was involved with drugs, this court presided only over defendant's first trial, at which no information concerning drug use was admitted into evidence. The state may be correct in asserting that its theory was that the defendant killed the victim because the victim was going to divulge defendant's drug involvements. However, the state's theory was just that--only a theory. There was no evidence admitted which would actually support the state's proposition. Therefore, there was not ample evidence before the court at defendant's first murder trial concerning

drugs or drug use by the defendant. Moreover, drug testing is generally not "reasonably related" to the crime of tampering with evidence, and does not, as other crimes perhaps would, raise an inference of drug abuse by the offender.

> FN8. In support of its argument, the state cites State v. Huey, 199 Conn. 121, 505 A.2d 1242 (1986), for the proposition that a sentencing court has very broad discretion in the information it may consider in sentencing a defendant. While this may be true, this court did not consider imposing drug testing because it did not have any evidence of drug use before it at the time of sentencing.

The state also contends that urinalysis falls within the "medical treatment" requirement which could have been imposed by the court pursuant to General Statutes § 53a-30(a)(2). In assessing the meaning of the term "medical treatment," the court is guided by well defined principles of statutory interpretation which require it "to ascertain and give effect to the apparent intent of the legislature." State v. Blasko, 202 Conn. 541, 553, 522 A.2d 753 (1987). If the language of the statute is clear and unambiguous, it is assumed that the language expresses the intention of the legislature, and the court need inquire no further into legislative intent. State v. Burns, 38 Conn.App. 8, 12, 658 A.2d 163 (1995). In such a case, as here, the court will simply accord the words expressed in the statute their plain and ordinary meaning. Id. The term "treatment," as used in the context described in the statute, is commonly defined as: "The application of remedies with the object of effecting a cure." American Heritage

Dictionary (Ed.1981). Thus, when the term "treatment" is given its plain and ordinary meaning, the court cannot agree that the extraction and testing of urine falls within the definition of medical "treatment." Accordingly, the court finds the state's argument that urinalysis falls within the definition of "medical treatment" to be without merit.

Based on the foregoing, the court finds that the probation officer exceeded his statutory authority, under General Statutes § 53a-30(b), in requiring the defendant to submit to urinalysis as a condition of his probation. [FN9] This condition was not imposed by the court, as there was no evidence of drug use before the court at the sentencing hearing. Furthermore, this was not a condition the court "could have" imposed, and it does not constitute "medical treatment" within the meaning of the statute.

> FN9. The fact that the defendant signed the probation form is inconsequential. At the time the form was to be signed, the defendant was faced with a Hobson's choice. If he signed, he would be forced to submit to urinalysis and/or drug testing, although it did not relate to his probation for the crime of tampering with evidence. If he did not sign, he would violate his probation or lose his entitlement to probation altogether. He was not in the presence of counsel. This cannot constitute free and voluntary consent or a waiver of constitutional rights.
> Assuming arguendo that the defendant "consented" to the urinalysis and/or waived his rights, "[i]t is the state's burden to prove that the consent was freely and voluntarily given ... [and][s]uch consent

may not be established by mere acquiescence to ... authority." State v. Fields, 31 Conn.App. 312, 324-25, 624 A.2d 1165, cert. denied, 226 Conn. 916, 628 A.2d 989 (1993). Thus, "[t]he ultimate question is whether the will of the consenting individual was overborne, or whether the consent was his unconstrained choice." Id., 325. Here, the state has not presented an argument that the defendant "consented" to the urinalysis. It therefore could not have met this burden. Moreover, even if the state had presented such an argument, the question of whether consent was freely and voluntarily given "is a question of fact to be determined from the totality of all the circumstances." Id. As discussed above, the court finds that the defendant's submission to urinalysis was not "his unconstrained choice". Id.

C.

Having found that the results of defendant's urinalysis were obtained by the probation officer in excess of his statutory authority under General Statutes § 53a-30(b), the next determination must be whether requiring the defendant to submit to urinalysis, in excess of statutory authority, violated his right to be free from unreasonable searches and seizures under the fourth amendment to the United States Constitution or Article I §§ 7 or 8 of the Connecticut Constitution. If the imposition of urinalysis violated defendant's constitutional rights, Practice Book § 821 may require that the urinalysis evidence be suppressed.

It is clear that the state-compelled collection and testing of urine constitutes a "search" subject to the demands of the search and seizure provisions of the federal and state constitutions. See Vernonia School Dist. 47J v. Acton, 515 U.S., 132 L.Ed.2d 564, 574, 115 S.Ct. 2386 (1995); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989); State v. Smith, 207 Conn. 152, 173, 540 A.2d 679 (1988).

"Under both the federal and state constitutions, a warrantless search is per se unreasonable, subject to a few well defined exceptions." State v. Santiago, 27 Conn.App. 741, 745, 610 A.2d 666, cert. denied, 223 Conn. 906, 610 A.2d 179 (1992). See also State v. Joyce, 229 Conn. 10, 24-25, 639 A.2d 1007 (1994). "Under such circumstances, the state bears the burden of proving that an exception to the warrant requirement exists." State v. Vargas, 34 Conn.App. 492, 496, 642 A.2d 47 (1994).

The State of Connecticut Office of Adult Probation did not have a warrant when it required the defendant to submit to urinalysis, and did not have a warrant when it had defendant's urine tested for the presence of illegal narcotics. Thus, the "search" of defendant's urine was per se unreasonable, and the state has presented no argument that this search was permitted under one of the well defined exceptions to the warrant requirement. See State v. Santiago, supra, 27 Conn.App. 745.

Notwithstanding the general rule relating to warrantless searches, as outlined above, some warrantless searches have been deemed permissible where "special needs, beyond the normal need for law enforcement, make the

warrant and probable-cause requirement impracticable." Vernonia School Dist. 47J v. Acton, supra, 132 L.Ed.2d 574. See also Griffin v. Wisconsin, 483 U.S. 868, 873, 97 L.Ed.2d 709, 107 S.Ct. 3164 (1987). A state's operation of its probation system has been held to present such a "special need," justifying, in certain circumstances, a search and seizure in the absence of a warrant. See Griffin v. Wisconsin, supra, 107 S.Ct. 3164, 3167-68. See also State v. Smith, supra, 207 Conn. 164-65. However, in such circumstances, the degree of impingement upon a probationer's privacy is "not unlimited." State v. Smith, supra, 207 Conn. 165.

Any restriction upon a probationer's constitutional rights "can be justified only to the extent actually required by legitimate demands of the probation process in any given case." State v. Smith, supra, 207 Conn. 166. Thus, a probationer's privacy expectations "may be diminished only to the extent necessary for his reformation and rehabilitation." (Emphasis added.) Id. Central to this determination is whether the condition imposed on the probationer is "reasonably related" to the purposes of the probation. Id., 170.

Probation is the product of a legislative scheme, and "[t]he significant role of statutes and the broad discretion usually accorded courts in administering the probation process means not only that statutory limitations must be observed but also the impact of constitutional norms must be carefully evaluated." Id., 167. Because the legislature chose to have the Office of Adult Probation carry out a part of the probation process, as provided in General Statutes § 53a-30(b), the limitations and demands recited above apply

with equal force to that Office.

As discussed above, in requiring the defendant to submit to urinalysis, defendant's probation officer exceeded the limitations set forth in General Statutes § 53a-30. State v. Smith, supra, 207 Conn. 167. Moreover, as discussed above, the probation officer imposed a probation condition upon the defendant which was not "reasonably related" to the purposes of his probation. Thus, the condition that defendant submit to urinalysis diminished his privacy expectations beyond the "extent necessary for his reformation and rehabilitation." Id., 166. Accordingly, the search and seizure of defendant's urine was an unreasonable search and seizure in violation of Article I, § 7 of the Connecticut Constitution. [FN10]

> FN10. Other jurisdictions have reached similar results. See, e.g., United States v. Wryn, 952 F.2d 1122 (9th Cir.1991) (warrantless search of probationer's home unreasonable in violation of fourth amendment where it was not authorized by statute, probation agreement, nor done with probationer's consent); United States v. Trzaska, 866 F.Supp. 98 (E.D.N.Y.1994) (warrantless probation search authorized neither by statute or regulation nor by narrowly tailored restrictions in probation agreement unlawful under fourth amendment). Certainly, if such searches have been found unlawful under the federal constitution, they will be entitled to at least as much scrutiny under the state constitution, since federal law establishes a minimum national standard for protecting individual

rights that state law is free to, and often does, exceed. See, e.g., Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) (state constitution establishes a fundamental right to education); State v. Geisler, 222 Conn. 672, 610 A.2d 1225 (1992) (state constitution affords broader protection against warrantless searches); State v. Oguendo, 223 Conn. 635, 613 A.2d 1300 (1992) (state constitution affords broader protection against seizure of the person).

Under the exclusionary rule, evidence found to be the fruit of a prior illegal or unconstitutional search or seizure must be suppressed by the court. State v. Ortiz, 14 Conn.App. 493, 501, 542 A.2d 734 (1988). Thus, all evidence against the defendant which was derived from the illegal search and seizure of his urine must be suppressed under the "fruit of the poisonous tree" doctrine, unless the state has shown that it was "sufficiently distinguishable to be purged of the primary taint." Id., 502. See also State v. Federici, 179 Conn. 46, 61, 425 A.2d 916 (1979). Here, the evidence against the defendant is directly derived from, and based entirely upon, the illegal search and seizure of his urine. As such, there can be no argument that it is sufficiently divorced from the prior illegal search as to warrant an exception to the suppression requirement.

Based on the foregoing, the court finds that the evidence against the defendant was obtained in excess of statutory authority and in violation of his right to be free from unreasonable searches and seizure under Article I, § 7 of the Connecticut Constitution. Accordingly, the court is required to grant the defendant's motion to suppress that

evidence pursuant to Practice Book § 821. State v. Marsala, supra, 216 Conn. 156.

D.

The court is unable to grant the defendant's motion to dismiss pursuant to Practice Book § 815(1). Research has failed to reveal caselaw supporting defendant's position that the foregoing circumstances constituted a "defect in the institution of prosecution," and this issue was not briefed adequately. The only grounds under which defendant's motion to dismiss could be granted are Practice Book §§ 815(5) or (9). However, the defendant is prohibited from moving to dismiss on those grounds because he was arrested pursuant to a warrant. Practice Book § 816.

II

Based on the foregoing, the defendant's motion to exclude/suppress is granted, and his motion to dismiss is denied without prejudice.

DN: CR 91-73111A
STATE OF CONNECTICUT
SUPERIOR COURT
J. D. OF LITCHFIELD
V.
JOHN TYLER FUESSENICH
JANUARY 2, 1996

MOTION TO EXCLUDE TEST RESULTS

Pursuant to the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, Article 1, §§ 7, 8, 9 and 20 of the Connecticut Constitution and Section 53a-32 of the Connecticut General Statutes, the Defendant moves to exclude as evidence at the probation violation hearing the results of tests of urine proportedly obtained from the Defendant in that the sentencing Court did not impose drug testing as a condition of probation and the probation officer exceeded his authority in requiring the Defendant to agree to drug testing and in requiring the Defendant to provide a urine sample.

THE DEFENDANT,
JOHN TYLER FUESSENICH

BY \s_____
HUBERT J. SANTOS
HOPE C. SEELEY
SANTOS, PECK, & SEELEY, P.C.
51 Russ Street
Hartford, CT 06106
(203) 249-6548

ORDER

The foregoing motion having been heard, it is hereby:

GRANTED/DENIED. .

BY THE COURT

_____

Judge

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been telefaxed and mailed, first class postage prepaid this 2nd day of January, 1996 to the following counsel of record:

Guy W. Wolf III, Esq.
Senior Assistant State's Attorney
James Fletcher, Esq.
Assistant State's Attorney
P.O. Box 325
Litchfield, CT 06759

/s/_____

HUBERT J. SANTOS

DN: CR 91-73111A
SUPERIOR COURT
J. D. OF LITCHFIELD
STATE OF CONNECTICUT
V.
JOHN TYLER FUESSENICH
FEBRUARY 8, 1996

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO EXCLUDE
TEST RESULTS AND MOTION TO DISMISS

I. Factual Background

On July 11, 1995, the Defendant pleaded guilty to three counts of tampering with physical evidence before The Honorable Walter Pickett. On that same date, the court sentenced the Defendant to four years, execution suspended with three years of probation. Specifically, the court stated:

> It is the sentence of the Court on each of the three counts; that is the Second Count, the Third Count, and the Sixth Count, that you be placed in the custody of the Commissioner of Corrections for a period of four years, sentences to run concurrently, execution suspended.

> Probation for three years. Costs are imposed in accordance with the statute.

See Excerpt of sentencing transcript, July 11, 1995, at 20, attached hereto as Exhibit A. There were no conditions of probation imposed by the court at this hearing.

The Defendant met with his probation officer, Michael Kalat, on the next day, July 12, 1995. Mr. Kalat required that the Defendant sign a form entitled "Conditions of Probation." See Exhibit B. This form provided that during the period of probation, the Defendant must abide by certain conditions, including:

> 1.
> Do not violate any criminal law of the United States, this state or any other state or territory.
> ....
> 7.
> Submit to any medical and/or psychological examination, urinalysis, and/or counseling sessions as required by the Court and submit to any alcohol and/or drug testing required by the Probation Officer.

See Exhibit B.

On July 13, 1995, two days after the sentencing hearing, the clerk of the court issued an "Order of Probation" which was never provided to the Defendant or his counsel. The Order of Probation is attached hereto as Exhibit C and provided that "said defendant during the probationary term fixed shall abide by the written statement of the conditions of probation furnished by the probation officer and the instructions given regarding the same." See Exhibit C.

On September 26, 1995, Michael Kalat, the Defendant's probation officer, applied for an arrest warrant on the grounds that the Defendant violated a condition of probation pursuant to Section 54a-32 of the Connecticut General Statutes. See Exhibit D. Specifically, the arrest warrant application alleged that the Defendant had submitted to an urinalysis test on

August 14, 1995 and that the laboratory determined that the Defendant's urine had tested positive for the use of cocaine. See Exhibit D at paragraph 5. Based upon this information, Mr. Kalat alleged that the Defendant had violated a condition of probation, namely, Condition #1 which prohibited the violation of any criminal law. See Exhibit D at paragraph 8; see also Exhibit B.

On January 2, 1996, the Defendant filed a Motion To Dismiss the charge on the grounds that the sentencing court imposed no condition of drug testing and the probation officer exceeded his authority in requiring the Defendant to agree to drug testing and in requiring the Defendant to provide a urine specimen. The Defendant also filed a motion to exclude as evidence at the probation violation hearing the results of tests of urine purportedly obtained from the Defendant since the sentencing court did not impose drug testing as a

condition of probation and the probation officer exceeded his authority in requiring the Defendant to agree to drug testing and in requiring the Defendant to provide a urine sample. See Exhibit E.

On January 25, 1996, the State filed an objection to both of the Defendant's motions. This memorandum of law is submitted in support of the Defendant's Motion To Exclude Test Results and Motion To Dismiss.

II. Legal Argument

The Defendant's Motion To Exclude The Test Results Should Be Granted Because The Probation Officer Exceeded His Authority And Violated The Defendant's Constitutional Rights In Requiring The Defendant To Submit To Urinalysis; Accordingly, The Motion To Dismiss Should Be Granted Because There Is A Defect In The Institution Of The Prosecution.

When the court imposed its sentence upon the Defendant in open court, it elected not to impose any conditions of probation. Section 919(5) of the Practice Book mandates that the court must "impose the sentence in the presence and hearing of the defendant, unless the defendant shall have waived his or her right to be present." The sentence imposed upon the Defendant in this case is reflected in the sentencing transcript which is attached hereto as Exhibit A. Therefore, the Defendant's sentence in this case did not include any special conditions of probation such as urine testing.

In State v. Smith, 207 Conn. 152, 166-7, 540

A.2d 679 (1988), the Connecticut Supreme Court recognized that probation conditions serve two primary purposes. It stated:

> [Probation conditions] ... are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large . . . These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed. . . . Supervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large. That permissible degree is not unlimited.
>
> ....
>
> Any restriction, however, upon a probationer's otherwise inviolable constitutional rights can be justified only to the extent actually required by legitimate demands of the probation process in any given case. Put another way, a probationer has a diminished expectation of privacy by virtue of such demands, **but such expectation may be diminished only to the extent necessary for his reformation and rehabilitation.**

Smith, 207 Conn. at 166-67. The Smith Court further

recognized that probation is the product of statute, and therefore, "[t]he significant role of statutes and the broad discretion usually accorded courts in administering the probation process means not only that statutory limitations must be observed but also that the impact of constitutional norms must be carefully evaluated." Smith, at 167.

Connecticut General Statute Section 53a-30 provides in relevant part as follows:

> (a) When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant: (1) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment; (2) undergo medical or psychiatric treatment and remain in a specified institution, when required for that purpose; (3) support his dependents and meet other family obligations; (4) make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or

damage caused thereby and the court may fix the amount thereof and the manner of performance; (5) if a minor, (A) reside with his parents or in a suitable foster home, (B) attend school, and (C) contribute to his own support in any home or foster home; (6) post a bond or other security for the performance of any or all conditions imposed; (7) refrain from violating any criminal law of the United States, this state or any other state; (8) if convicted of a misdemeanor or a felony, other than a capital felony, a class A felony or a violation of section 21a-278, 21a-278a, 53a-55, 53a-56, 53a-56b, 53a-57, 53a-58 or 53a-70b or any offense for which there is a mandatory minimum sentence which may not be suspended or reduced by the court, and any sentence of imprisonment is suspended, participate in an alternate incarceration program; (9) reside in a residential community center or halfway house approved by the commissioner of correction, and contribute to the cost incident to such residence; (10) participate in a program of community service labor in accordance with section 53a-39c; (11) if convicted of a violation of section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b and (A) the conviction is of a second or subsequent violation of any of said sections or (B) at the time of the offense, the defendant was eighteen

> years of age or older and the victim was under thirteen years of age, undergo specialized sexual offender treatment; (12) satisfy any other conditions reasonably related to his rehabilitation. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any.

See Conn. Gen. Stat. § 53a-30 (1995). As previously stated, the sentencing court did not impose any of these conditions.

Subsection (b) of Conn. Gen. Stat. § 53a-30 provides as follows:

> (b) When a defendant has been sentenced to a period of probation, the Office of Adult Probation may require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) which are not inconsistent with any condition actually imposed by the court.

Therefore, the Office of Adult Probation is permitted to require a defendant to comply with any of the twelve conditions delineated in subsection (a) which the court

could have imposed. As noted recently by the Connecticut Appellate Court, the discretion to impose conditions "is not unlimited, as statutory and constitutional constraints must be observed." State v. Graham, 33 Conn. App. 432, 447, 636 A.2d 852 (1994). In fact, "a condition of probation may diminish a probationer's liberty rights only to the extent necessary for his reformation and rehabilitation." Id. (citations omitted).

In Graham, the trial court imposed a condition of probation that required the defendant to provide for the proper care and cleanliness of the children and home. Id., at 446. The Appellate Court concluded that these conditions did "not serve to rehabilitate or to reform the defendant because they do not relate to the defendant's behavior involved in her convictions for larceny and drug crimes." Id., at 448.

In the present case, the Defendant pleaded guilty to three counts of tampering with physical evidence in violation of Conn. Gen. Stat. § 53a-155.[8] As noted in the arrest warrant affidavit, when the Defendant's probation officer interviewed him on the day after the sentencing hearing and questioned him about his use of alcohol and/or drugs, the Defendant "denied any current problem with alcohol or drug abuse." See Exhibit D, paragraph 4. Even though the Defendant's conviction was not related to a drug offense, the probation officer then informed the Defendant "that as a standard condition of probation, he would be tested for any illegal

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[8] Conn. Gen. Stat. § 53a-155 provides in relevant part: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding.

substances." Id. First, urinalysis testing is not a standard condition of probation; in fact, there are no "standard" conditions of probation.[9]

Secondly, the charges that the Defendant pleaded guilty to were not related to drugs. Therefore, the trial court would not have been able to impose drug testing as a condition of probation under Conn. Gen. Stat. § 53a-30(12)[10] since -- just as in Graham -- this condition does not serve to rehabilitate or to reform the Defendant

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[9] The Defendant submits that the form he was required to sign by the office of Adult Probation without the assistance of counsel which is attached hereto as Exhibit B, is illegal because it requires the probationer to agree to conditions of probation which are not authorized by Conn. Gen. Stat. § 53a-30(a). Compare Exhibit B to Conn. Gen. Stat. § 53a-30(a). For example, it requires that the probationer agree to waive extradition from any other state, territory or jurisdiction. See Exhibit B, at paragraph 5. Likewise, it requires the probationer to "[s]ubmit to a search of your person, possessions, vehicle or residence when the Probation Officer has a reasonable cause to do so." See Exhibit B, at paragraph 10.

[10] Conn. Gen. Stat. § 53a-30(12) provides that the court may require a probationer to "satisfy any other conditions reasonably related to his rehabilitation."

because it does not relate to his behavior involved in his convictions for three counts of tampering with physical evidence. Compare State v. Fox, 22 Conn. App. 449, 457, 577 A.2d 1111 (1990) ("special condition of probation prohibiting defendant from engaging in private real estate work during the period of probation was reasonably related to his rehabilitation in light of the crimes he committed" -- larceny by extortion and attempt to commit bribe receiving by solicitation); State v. Smith, 207 Conn. 152, 169-70, 540 A.2d 679 (1988) (where the defendant had committed a robbery to obtain money for drugs, probation officer's request to modify conditions to include urinalysis after he had observed the defendant over a period of time was reasonably related to the offense for which defendant was on probation).

As previously stated, "a probationer has a diminished expectation of privacy ..., **but such**

expectation may be diminished only to the extent necessary for his reformation and rehabilitation." The probation officer -- who met the Defendant for the first time on July 12, 1995 and made his determination then to require drug testing -- had no evidence that the Defendant used drugs or that the crimes he pleaded guilty to -- tampering with physical evidence -- were the result of the use of drugs. Therefore, while the State is permitted a degree of impingement upon the privacy of a probationer that would not be constitutional if applied to the public at large, that permissible degree is not unlimited and does not include drug testing unless drugs were related to the underlying conviction or the probation officer had evidence based upon his direct observation of the defendant over a period of time that he was using drugs.

Since this condition of urinalysis imposed by the

Office of Adult Probation could not have been imposed originally by the court, the Defendant's probation officer exceeded his statutory authority and impermissibly infringed upon the Defendant's constitutional right under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 8 and 20 of the Connecticut Constitution to be free from unreasonable searches and seizures by requiring the Defendant to submit to urinalysis.[11] Accordingly, since the seizure of the Defendant's urine was in violation of Conn. Gen. Stat. § 53a-30 as well as the state and federal constitutional provisions relating to illegal

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[11] As recognized by the Connecticut Supreme Court in Payne v. Robinson, 207 Conn. 565, 573, 541 A.2d 504, cert. denied, 488 U.S. 898 (1988), "[a]pplication of the exclusionary rule to the probation hearing might therefore contribute significantly to the deterrence of illegal searches" because "[i]f illegally obtained evidence was admissible in such circumstances, the police officer might very well discount the fact that such evidence was inadmissible at a criminal trial, believing that incarceration of the probationer would instead be achieved through the revocation of his probation."

searches and seizures, the motion to exclude should be granted. Consequently, because there was a defect in the institution of the prosecution, the Defendant's motion to dismiss should be granted in accordance with P.B. § 815(1).

THE DEFENDANT,
JOHN TYLER FUESSENICH

BY/s/
HUBERT J. SANTOS
HOPE C. SEELEY
SANTOS, PECK, & SEELEY, P.C.
51 Russ Street
Hartford, CT 06106
(203) 249-6548

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been telefaxed on February 8, 1996 and hand-delivered on the 9th day of February 1996 to the following counsel of record:

Guy W. Wolf III, Esq.
Senior Assistant State's Attorney
P.O. Box 325
Litchfield, CT 06759

/s/
HOPE C. SEELEY

Arrest Warrant Application
STATE OF CONNECTICUT
Superior Court

ARREST WARRANT APPLICATION
JD-CR-64 Rev. 10-93
PR. BK. 593, 593A, 594
GEN. STAT. 54-2a

NAME AND RESIDENCE (*Town*) OF ACCUSED
FUESSENICH, JOHN Winsted

COURT TO BE HELD (*Town*) G.A. NO.
Litchfield JD

APPLICATION FOR ARREST WARRANT

TO: A Judge of the Superior Court

The undersigned hereby applies for a warrant for the arrest of the above-named accused on the basis of the facts set forth in the affidavit below.

DATE & SIGNATURE Date 9-28-95
SIGNED (*Prosecutorial Official*)
/s/_____

AFFIDAVIT

The undersigned, being duly sworn, deposes and says:

1. That I, Michael P. Kalat, am a duly appointed Probation Officer with the Office of Adult Probation, and have been so for a period of approximately eleven years. As such, I have personal knowledge of the facts hereinafter stated were as a result of my own investigative efforts or of a check of the records of the Court, by myself or other probation officers.

2. On 7-11-95, the Honorable Walter Pickett, Judge for the Superior Court, JD in Litchfield, sentenced John Tyler Fuessenich on the charge of Tampering with Evidence, three counts, in case DN CR91-73111 to four years, execution suspended, each count concurrent probation three years. There were no special conditions ordered by the Court.

3. On 7-12-95, in the presence of this affiant, John Tyler Fuessenich reviewed and signed the conditions of probation. On that date, this affiant was assigned supervision of Fuessenich's probation file.

4. On 7-12-95, this affiant, in the process of reviewing the conditions of probation, questioned Fuessenich as to whether he had a history of alcohol or drug abuse. Fuessenich denied any current problem with alcohol or drug abuse. Fuessenich was informed on that date that as a standard condition of probation, he would be tested for any illegal substance.

5. On 8-14-95, Fuessenich submitted to an urinalysis test (Massey Lab 1009) as requested by probation. On 8-31-95, probation received a Massey Lab report indicating that urine number 1009 had tested positive for the use of cocaine.

6. On 8-18-95, during a probation interview with Fuessenich, he was questioned in regards to the positive drug test. On that date, Fuessenich denied any use of illegal substance cocaine.

7. On 9-20-95, this affiant telephoned the Massey Lab and confirmed that urine #1009 had tested positive for cocaine. The lab also indicated that as a result of a first positive test, a subsequent test was done, which also tested positive for the presence of cocaine.

8. Based on this information, it appears John Tyler Fuessenich has been involved in illegal activity and has violated the following condition of probation which state as follows:

CONDITION #1 DO NOT VIOLATE ANY CRIMINAL LAW OF THE UNITED STATES, THIS STATE OR ANY OTHER STATE OR TERRITORY.

A warrant charging John Tyler Fuessenich with Violation of Probation, section 53a-32 of the CGS, is respectfully requested.

PHYSICAL DESCRIPTION: WHITE MALE, DOB: 9-5-55, POB: TORRINGTON, CT SS# 044-50-0565, 5'10, 175 LBS., BROWN HAIR, BROWN EYES.

This warrant has been reviewed and probable cause has been found by:

/s/_____
Peter Trombley, CPO

DATE & SIGNATURE Date SEP. 26 1995
SIGNED (*Affiant*) Michael Kalat, SPO
JURAT Subscribed and Sworn to Before Me on (*Date*) SEP. 26 1995 SIGNED (Notary Public)
/s/_____
My Commission Expires Aug. 31, 1997

FINDING

The foregoing Application for an arrest warrant, and affidavit(s) attached to said Application, having been submitted to and considered by the undersigned, the undersigned finds from said affidavit(s) that there is probable cause to believe that an offense has been committed and that the accused committed it, and, therefore, that probable cause exists for the issuance of a warrant for the arrest of the above-named accused.

DATE & SIGNATURE Date 9/28/95 Signed (*A Judge of the Superior Court*)
/s/_____

PROBATION/CONDITIONAL
DISCHARGE/SUSPENDED PROSECUTION
VIOLATION, TERMINATION, MODIFICATION
PROCEEDINGS
JD-CR-59 Rev. 11-91
Gen. Stat. § 17a-653 to 658, 53a-29, 30, 31, 32, 33, 34
Pr. Bk. §543

STATE OF CONNECTICUT
SUPERIOR COURT

1. PREPARER-File all three copies with clerk.
2. CLERK-After judgment is prepared, distribute copies as indicated at bottom.

DOCKET NO. NAME OF DEFENDANT
CR91-73111 FUESSENICH, JOHN
G.A. NO./Judicial District
JD
PLACE OF SENTENCING
Litchfield
DATE OF SENTENCING
7-11-95
DATE OF OFFENSE
3-20-91
CRIMES(S) FOR WHICH DEFENDANT WAS SENTENCED
Tampering with Physical Evidence
DATE OF BIRTH
9-5-55
ORIGINAL SENTENCE (*Specify period of suspension, if any*)
4 yrs. e/s ea. ct. conc.
NAME OF JUDGE ENTERING ORDER OF

PROBATION OR CONDITIONAL DISCHARGE
Walter Pickett
DURATION OF PERIOD OF PROBATION OR CONDITIONAL DISCHARGE
3 yrs.
DATE OF ORDER
MODIFICATION OF ORIGINAL SENTENCE (*Specify new sentence*)
NAME OF JUDGE ENTERING ORDER OF MODIFICATION
DATE OF MODIFICATION

MOTION FOR x Violation of Probation
Is the defendant in custody? NO
Is a warrant requested? YES

IF MOTION FOR MODIFICATION, SPECIFY MODIFICATION REQUESTED

REASON FOR MOTION
See attached affidavit

DATE AT (*Town*)
Waterbury
ON (*Date*)
9-26-95
SIGNED
/s/_____

The violation of Probation/Conditional Discharge/Suspended Prosecution is: Michael Kalat, SPO
NOT Established
Established and the judgment entered in the above case is opened with respect to the order of probation/conditional discharge/suspended prosecution only, and the probation/conditional discharge/suspended prosecution is:
Continued to (*date*)_____
Modified/Enlarged as follows:_____
The probation/conditional discharge is revoked and the defendant is committed to the custody of:
THE COMMISSIONER OF CORRECTION OTHER
SO MUCH OF THE ORIGINAL SENTENCE AS HAS NOT BEEN SERVED OTHER
The suspended prosecution is terminated and the prosecutor may proceed with the case.

The motion to modify the order of Probation/Conditional Discharge/Suspended Prosecution is:
APPROVED as requested.
DENIED.
DENIED but the order is modified as follows:_____

The motion to terminate the order of Probation/Conditional Discharge/Suspended Prosecution is:
APPROVED and the defendant is discharged/released from probation/conditions noted in conditional discharge.
APPROVED, and the suspended prosecution is terminated, the defendant is discharged and the case is dismissed.
DENIED.

OFFICE OF ADULT PROBATION
SUPERIOR COURT

NAME OF PROBATIONER
John Tyler Fuessenich
PERIOD OF PROBATION
3 years
DATE
7/12/95
STATE NO.
G.A. NO/JUDICIAL DISTRICT AT
JD Litchfield
NAME OF JUDGE
Walter Pickett
DOCKET NO

NOTICE TO DEFENDANT

In accordance with the authority conferred by the State of Connecticut and in keeping with the requirements of the Connecticut General Statutes you, as of the above date, have been placed on probation by the Superior Court for the period specified above.

You are hereby advised that the court may at any time during the period of probation modify or enlarge the conditions of probation, and may extend the period of probation, as authorized by the General Statutes. The court may also issue a warrant for your arrest, revoke your probation and require you to serve the sentence imposed or impose any lesser sentence for violation of any of the conditions of your probation.

DURING THE PERIOD OF PROBATION YOU SHALL ABIDE BY THE FOLLOWING CONDITIONS:

1. Do not violated any criminal law of the United States, this state or any other state or territory.

2. Report as the Probation Officer directs, give immediate notice if arrested and, if incarcerated, report to the Probation Officer immediately upon your release.

3. Keep the Probation Officer informed of your whereabouts, give immediate notice of any change in address or employment, and permit the Officer to visit you as circumstances may require.

4. Do not leave the State of Connecticut without permission from the Probation Officer.

5. Agree to waive extradition from any other state, territory or jurisdiction.

6. Do not operate a motor vehicle in the State of Connecticut if your privilege or right to drive is under suspension.

7. Submit to any medical and/or psychological examination, urinalysis, and/or counseling sessions as required by the Court and submit to any alcohol and/or drug testing required by the Probation Officer.

8. If ordered to make restitution by the Court, you

shall make such payments in accordance with a schedule arranged by the Court or Probation Officer.

9. If placed on probation for a felony conviction, you shall not possess, receive or transport any firearm or dangerous instrument as those terms are defined in Section 53a-3 of the Connecticut General Statutes.

10. Submit to a search of your person, possessions, vehicle or residence when the Probation Officer has a reasonable cause to do so.

11. Court Ordered/Special Conditions:

I have read and the officer has reviewed with me the conditions of probation. I understand them and I shall abide by them.
SIGNED (*Probationer*)
John Tyler Fuessenich
PROBATION OFFICER - WITNESS
/s/
DATE 7/12/95
DISTRIBUTION: WHITE - Probationer
YELLOW - Probation Officer